

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs July 20, 2005

STATE OF TENNESSEE v. CHRISTOPHER NEIL SIMMONS

**Direct Appeal from the Circuit Court for Bedford County
No. 15559 Lee Russell, Judge**

No. M2004-02800-CCA-R3-CD - Filed August 16, 2005

The defendant challenges the denial of alternative sentencing. Because the defendant failed to include the presentence report in the record on appeal, we presume that the trial court accurately evaluated the defendant's criminal history and background in determining that he was not a suitable candidate for probation. Moreover, we conclude that the requirements that the defendant asserts should have been made prior to the trial court's denial do not apply in this case. Therefore, we affirm the trial court's denial of alternative sentencing.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which ALAN E. GLENN and ROBERT W. WEDEMEYER, JJ., joined.

Donna Leigh Hargrove, District Public Defender, and Andrew Jackson Dearing, Assistant Public Defender, for the appellant, Christopher Neil Simmons.

Paul G. Summers, Attorney General and Reporter; Benjamin A. Ball, Assistant Attorney General; William Michael McCown, District Attorney General; and Michael Randles and Ann Filer, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

Facts and Procedural History

The defendant, Christopher Neil Simmons, pled guilty to introduction of drugs into a penal institution in violation of Tennessee Code Annotated section 39-16-201. The trial court held a sentencing hearing after which the defendant was found to be a Range I, standard offender, and sentenced to four and a half years in the Department of Correction. On appeal, the defendant contends that the trial court erred in denying alternative sentencing.

The State summarized the facts underlying the offense during the plea colloquy as follows:

The factual basis is, on January 24th of this year, about 6:45 in the A.M., the defendant was serving a sentence, I believe out of General Sessions Court, in the Bedford County Jail. I think he was specifically housed in the Annex, which we would probably all refer to as the old block jail; it's on the historical register.

And the correctional officers had gotten everyone up to feed them, and all the various inmates had left. And one of the corrections officers went around to make sure that indeed everyone was up out of their beds and had gone to eat. And he noticed that the defendant was still lying in his bed.

He, I believe, first yelled his name and got no response from the defendant. When that happened he then shook him a little bit to try to wake him. Again, there was no response from the defendant. I think he again called his name. This time probably even louder.

At this point he got on his radio and called for assistance from other correctional officers, and other correctional officers began coming to this point. They tried smelling salts, and again, that did not rouse the defendant. They noticed fluid coming out of his mouth, and of course at this point they contacted the EMS personnel, and of course their various supervisors.

And of course, EMS had to come, and ultimately they had to carry him to the hospital. And the defendant was diagnosed as basically having overdosed on something. Of course there was various lab work done, and he was positive for, I believe it's the Benzodiazepines, which is a family of medication.

They then inventorized his stuff at the jail, and in that they did find 20 tablets, which appear to be Methadone. That was sent to the T.B.I. crime lab, and indeed it was 20 tablets of methadone, which the defendant did not have the authority at the jail to have in his personal property, back where the inmates are housed.

And he was, I believe, interviewed by the sheriff's department personnel, and admitted that had the Methadone improperly at the jail.

The defendant offered no proof at the sentencing hearing and, after reviewing the presentence report and arguments from counsel, the trial court denied the defendant probation, finding that:

Based upon his very extensive past record and the fact that he is in an absconder status, I do not find him by any stretch of the imagination to be a good candidate for alternative sentencing. The presumption in favor of alternative sentencing that is created by 40-35-102(6) is more than overcome by his past record and his behavior while on probation.

Analysis

This court's review of the sentence imposed by the trial court is *de novo* with a presumption of correctness. Tenn. Code Ann. § 40-35-401(d). This presumption is conditioned upon an affirmative showing in the record that the trial judge considered the sentencing principles and all relevant facts and circumstances. State v. Pettus, 986 S.W.2d 540, 543 (Tenn. 1999). If the trial court fails to comply with the statutory directives, there is no presumption of correctness and our review is *de novo*. State v. Poole, 945 S.W.2d 93, 96 (Tenn. 1997).

The burden is upon the appealing party to show that the sentence is improper. Tenn. Code Ann. § 40-35-401(d), Sentencing Commission Comments. In conducting our review, we are required, pursuant to Tennessee Code Annotated section 40-35-210, to consider the following factors in sentencing:

(1) [t]he evidence, if any, received at the trial and the sentencing hearing; (2) [t]he presentence report; (3) [t]he principles of sentencing and arguments as to sentencing alternatives; (4) [t]he nature and characteristics of the criminal conduct involved; (5) [e]vidence and information offered by the parties on the enhancement and mitigating factors in §§ 40-35-113 and 40-35-114; and (6) [a]ny statement the defendant wishes to make in the defendant's own behalf about sentencing.

Under the Criminal Sentencing Reform Act of 1989, trial judges are encouraged to use alternatives to incarceration. An especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing options in the absence of evidence to the contrary. Tenn. Code Ann. § 40-35-102(6).

In determining if incarceration is appropriate, a trial court may consider the need to protect society by restraining a defendant having a long history of criminal conduct, the need to avoid depreciating the seriousness of the offense, whether confinement is particularly appropriate to effectively deter others likely to commit similar offenses, and whether less restrictive measures have often or recently been unsuccessfully applied to the defendant. Tenn. Code Ann. § 40-35-103(1); see also State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

A court may also consider the mitigating and enhancing factors set forth in Tennessee Code Annotated sections 40-35-113 and -114, as they are relevant to the section 40-35-103 considerations. Tenn. Code Ann. § 40-35-210(b)(5); State v. Boston, 938 S.W.2d 435, 438 (Tenn. Crim. App. 1996). Additionally, a court should consider the defendant's potential or lack of potential for rehabilitation when determining if an alternative sentence would be appropriate. Tenn. Code Ann. § 40-35-103(5); Boston, 938 S.W.2d at 438.

There is no mathematical equation to be utilized in determining sentencing alternatives. Not only should the sentence fit the offense, but it should fit the offender as well. Tenn. Code Ann. §

40-35-103(2); State v. Batey, 35 S.W.3d 585, 588-89 (Tenn. Crim. App. 2000). Indeed, individualized punishment is the essence of alternative sentencing. State v. Dowdy, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). In summary, sentencing must be determined on a case-by-case basis, tailoring each sentence to that particular defendant based upon the facts of that case and the circumstances of that defendant. State v. Moss, 727 S.W.2d 229, 235 (Tenn. 1986).

We initially note that the defendant has failed to include the presentence report in the record on appeal. It is well settled that it is the duty of the appellant to provide a record that conveys a fair, accurate and complete account of what transpired with regard to the issues that form the basis of the appeal. Tenn. R. App. P. 24(b); see State v. Taylor, 992 S.W.2d 941, 944 (Tenn. 1999). Certainly the report was a vital portion of the proof of what the court characterized as the defendant's extensive record and probation violations, and is equally important to appellate review; therefore, in its absence, we will presume the accuracy of the trial court's findings. See State v. Tommy Dwayne Naillon, No. 03C01-9403-CR-00109, 1994 Tenn. Crim. App. LEXIS 811, at *2 n. 1 (Tenn. Crim. App., at Knoxville, Dec. 13, 1994), perm. to appeal denied (Tenn. April 10, 1995).

On appeal, the defendant first contends that the trial court erred in denying him alternative sentencing because the offense was not "especially violent, horrifying, shocking, reprehensible, offensive, or otherwise of an excessive or exaggerated degree." See State v. Travis, 622 S.W.2d 529, 534 (Tenn. 1981). Moreover, the defendant contends that the trial court was required to find that the imposed sentence would have a deterrent effect within the jurisdiction before it denied alternative sentencing. See State v. Smith, 735 S.W.2d 859, 864 (Tenn. Crim. App. 1987). However, neither of these requirements applied in the present case because the trial court's denial of probation was not based upon the nature of the offense or deterrence, respectively, but rather on the defendant's extensive record and previous unsuccessful attempts at rehabilitation. See Travis, 622 S.W.2d at 534 (requirement only applies when denial of alternative sentence is based upon the nature of the offense); Smith, 735 S.W.2d at 864 (imposed sentence should have a deterrent effect on the jurisdiction if the denial is based on the ground of deterrence). Therefore, because the defendant has failed to establish that the trial court erred in denying him probation, the judgment of the trial court is affirmed.

Conclusion

The denial of alternative sentencing is affirmed.

JOHN EVERETT WILLIAMS, JUDGE